UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Clearence DAVIS 264 58 4961

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2463

Clearence DAVIS

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 9 June 1987, an Administrative Law Judge of the United States Coast Guard at Jacksonville, florida, revoked Appellant's Merchant Mariner's License and Merchant Mariner's Document upon finding proved two charges of misconduct. Each charge was supported by one specification. The first charge and specification found proved alleged that Appellant, while acting under the authority of the captioned license and document, on or about 21 December 1986, on board the S/S MALLORY LYKES, wrongfully assaulted and battered the Second Assistant Engineer on watch in the engineroom with a dangerous weapon, by stabbing and repeatedly slashing at im with a knife, second charge and specification found proved alleged that Appellant, while acting under the authority of the captioned license and document, on or about 18 February 1987, on board the S/S MORMACSKY, wrongfully assaulted and battered the Chief Engineer, by verbally cursing at him, grabbing and striking him with a flashlight while he was seated at his desk, and again grabbing and forcing him across his office when he got up from his desk.

The hearing was held at Jacksonville, Florida, on 10 March, 2, 27, and 29 April 1987.

Appellant appeared at the session of the hearing held on 10 March 1987 with counsel, and represented himself at the remaining sessions of the hearing. Appellant entered, in accordance with 46 CFR 5.527(a), an answer of deny to each charge and specification.

The Investigating Officer introduced in evidence fifteen exhibits

and called five witnesses.

Appellant introduced five exhibits into evidence and called one witness. Appellant testified in his own behalf.

The Administrative Law Judge admitted one document as an Administrative Law Judge exhibit.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that each charge and respective specification had been ound proved, and entered a written order revoking all licenses and/or documents issued to Appellant.

The complete Decision and Order was dated 9 June 1987 and was served on Appellant on 11 June 1987. Appellant requested and was granted an extension of time to perfect his appeal. Appeal was timely filed and considered perfected on 11 September 1987.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of a Coast Guard Merchant Mariner's License, No. 549530 and Merchant Mariner's Document, No. 264 58 4961. Appellant's License authorized him to serve as Third Assistant Engineer of steam vessels of any horse power. Appellant's Document qualified him to sail as any unlicensed rating in the engine department, tankerman grade A, and all lower grades, ordinary seaman, steward's department, food handling.

On or about 21 December 1986, Appellant, while acting under the authority of the captioned license and document, on board the S/S MALLORY LYKES, which was moored in the Port of Callao, Peru, wrongfully assaulted and battered Gary L. Smith, the Second Assistant Engineer on watch in the engineroom, with a dangerous weapon, by stabbing and repeatedly slashing at him with a knife.

The S/S MALLORY LYKES (EX: AMERICAN RIGEL), 14,081 gross tons, O. N. DN 297384, is a documented vessel under the laws of the United States. Built in 1964 in Pascagoula, Mississippi, she is owned by United States Lines, and operated by Lykes Brothers Steamship Co. Inc., as a carrier of freight.

On or about 18 February 1987, Appellant, while acting under the authority of the captioned license and document, on board the S/S MORMACSKY, which was moored in the Port of Jacksonville, Florida, wrongfully assaulted and battered Charles T. Ecker III, the Chief Engineer, by verbally cursing at him, grabbing and striking him with a

flashlight while he was seated at his desk, and again grabbing and forcing him across his office when he got up from his desk.

The S/S MORMACSKY, O.N. 578288, 22,354 gross tons, is a documented vessel under the laws of the United States. Built in 1977, she is owned by Wilmington Trust Company, and operated by Moore McCormack Bulk Transport, Inc., as a tank ship.

BASES OF APPEAL

Appellant raises the following issues on appeal:

1) The Administrative Law Judge erred in considering the Appellant's prior record.

2) The Administrative Law Judge failed to fully inform the Appellant of his right to procure additional counsel and failed to give Appellant reasonable opportunity to procure additional counsel.

3) The Administrative Law Judge allowed inadmissible hearsay into the record which tainted the whole proceeding.

4) The order of the Administrative Law Judge revoking the documents of Appellant was an overly severe penalty under the circumstances, amounting to arbitrary, capricious and excessive action.

Appearance: Mitchel E. Woodlief, Esq.

OPINION

I

Appellant raises the issue concerning the use of Appellant's prior record for the first time on appeal. Appellant made no objection concerning the record at the hearing. Appellant, himself, at several times during the hearing, placed his prior record in issue with statements that he had never had a problem in the last twenty years on board ships. (Transcript of 3 April 87, p. 13, lines 1-6; p. 24, lines 19-24; p. 25, lines 16-19; Transcript of 29 April 87, p. 22, lines 4, 15-17; pp. 27-28). Appellant's claim to an unblemished record over the past twenty years is defective and untrue through his own failing to mention an incident that occurred over ten years ago. Therefore, in fairness to the proceedings, any oversight on Appellant's part with respect to his prior record, including any incidents that occurred within the proffered period even if over ten

years old, is legitimately introduced at the hearing. It should be noted that 46 CFR 5.565(a) generally prohibits the introduction of a prior record of incidents over ten years old since the probative value has diminished to the extnt that it is substantially outweighed by the prejudicial effect to the Appellant. However, Appellant should not be allowed to hide behind the regulation after he, himself, places his record in a false light. Therefore, it was not clearly erroneous to consider the prior record of Appellant either for purposes of impeachment or in rebuttal to Appellant's remarks indicating he had no prior record, despite the age of the record. See 46 CFR 5.549(a),(b); 46 CFR 5.565(e).

It is a well established rule that in order to preserve such an issue on appeal there must have been a valid motion or objection made at the hearing, absent clear error. See 46 CFR 5.701(b)(1); Appeal Decision 2458 (GERMAN); Appeal Decision 2376 (FRANK); Appeal Decision 2400 (WIDMAN). Failure to object at the hearing waives the issue on appeal. GERMAN, supra, Appeal Decision 2384 (WILLIAMS); Cf. Appeal Decision 2184 (BAYLESS); Appeal Decision 2151 (GREEN); Appeal Decision 1977 (HARMER). NOTE: CITES OK

II

Appellant argues that upon withdrawal of his counsel, Mr. John D. Monroe, Esq., at the beginning of the second session of the hearing on 3 April 1987, the Administrative Law Judge erred in not advising Appellant of his right to be represented by other counsel. I disagree.

Appellant concedes that he had initially been advised of his rights to counsel by the Investigating Officer prior to the hearing ad the Administrative Law Judge advised Appellant of all his rights at the initial session of the hearing on 10 March 1987. (Appellant's Brief at 5). Appellant chose to be represented by an attorney and chose to allow this attorney to withdraw for reasons of financial hardship. (Transcript of 10 March 87, at p. 2-3; 3 April 87 at p. 4-5). This is Appellant's right. At the time counsel was excused, the Administrative Law Judge specifically asked Appellant if he had any objection to proceeding without counsel. Appellant did not object, and indicated that this would be fine with him. (Transcript of 3 April 87 at p. 5, line 3-5).

The regulations do not require that Appellant be readvised of his rights at the point that counsel chooses to withdraw. See 46 CFR 5.519. Appellant concedes he was advised of his rights, due process

requires nothing more. See Appeal Decision 2222 (FIOCCA); Appeal Decision 2207 (CLARK); Appeal Decision 2119 (SMITH); Appeal Decision 2089 (STEWART); Appeal Decision 2008 (GOODWIN).

Again, no objection or motion was made at the hearing regarding this matter. Therefore, the issue, if any, is waived, and can not be raised for the first time on appeal. Appeal Decision 2458 (GERMAN); Appeal Decision 2376 (FRANK); Appeal Decision 2384 (WILLIAMS). Appellant also asserts that he was not given sufficient time to obtain additional counsel. Appellant made no such request. In light of Appellant's answer that he had no objection to proceeding without counsel, the Administrative Law Judge was not in error in proceeding with the hearing.

III

Appellant asserts that it was error for the Administrative Law Judge to admit Exhibit 6, page 41 of the official logbook of the S/S MALLORY LYKES dated 7 January 1987 due to the hearsay nature of the exhibit. Incorporated by reference into page 41 of the log book are 14 attachments relating to the entry. Objection is made to these attachments as well.

According to 46 CFR 5.545(b), regarding the admissibility of logbook entries, "an entry kept in any logbook may be admitted into evidence as an exception to the hearsay rule, under the Federal Rules of Evidence, as a record of a regularly conducted activity." It is well established that the notation of disciplinary action, injury investigations, and the like are entries routinely made by masters in the official ship's log. In this case, such an entry was required by 46 U.S.C. 11502. See Appeal Decision 2417 (YOUNG); Appeal Decision 2403 (BERGER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2289 (ROGERS). Likewise, statements attached to and made a part of the official log entries are admissible. See Appeal Decision 1321 (CORNELIUS); Appeal Decision 1994 (TOMPKINS). Therefore, Exhibit 6 was properly admitted in accordance with 46 CFR 5.545(b). Appellant did not object to its admission at the hearing, and will not be allowed to do so now. There is no evidence in the record indicating the Administrative Law Judge gave Exhibit 6 any additional weight triggering the procedural requirements of 46 CFR 5.545(c). The issue, if any, with respect to Exhibit 6, is waived, and can not be raised for the first time o appeal. Appeal Decision 2458 (GERMAN); Appeal Decision 2376 (FRANK); Appeal Decision 2384 (WILLIAMS).

IV

Finally, Appellant argues that the revocation order was overly severe, amounting to arbitrary, capricious and excessive action. I disagree.

The order imposed at the conclusion of a case is exclusively within the discretion of the Administrative Law Judge, and will not be modified on appeal unless clearly excessive or an abuse of discretion. Appeal Decisions 2423 (WESSELS), Appeal Decisions 2414 (HOLLOWELL); Appeal Decision 2391 (STUMES); Appeal Decision 2379 (DRUM); Appeal Decision 2378 (CALICCHIO); Appeal Decision 2366 (MONAGHAN); Appeal Decision 2352 (IAUKEA); Appeal Decision 2331 (ELLIOTT); and Appeal Decision 2313 (STAPLES). Appellant has made no such showing here.

Though the Administrative Law Judge was not bound by the Suggested Range of An Appropriate Order found in 46 CFR 5.569(d), Appeal Decision 2362 (ARNOLD), his order revoking all licenses and documents, is within the suggested range for an offense of misconduct involving violent acts against other persons resulting in injury. A close reading of the Decision and Order indicates that the Administrative Law Judge carefully considered all the relevant factors. (Decision and Order at 12-14)

The finding of proved to the charges and specifications supports therevocation order since it clearly underscores the Appellant's propensities toward violence. (Decision and Order at 12-14). The Administrative Law Judge considered the evidence Appellant introduced in mitigation, but found the overwhelming factor supporting the order was the potentially fatal nature of the attack on the Assistant Second Engineer on the MALLORY LYKES. (Decision and Order at 14). Furthermore, the order is in keeping with prior decisions on appeal involving assault and battery inflicting serious injury. See Appeal Decision 1549 (CHAPMAN); Appeal Decision 1892 (SMITH); Appeal Decision 2017 (TROCHE); Appeal Decision 2313 (STAPLES); Appeal Decision 2331 (ELLIOTT). The fact that Appellant displayed two independent, violent episodes of this nature on separate ships involving different victims convinces me that Appellant's potential for future violence is great. Appeal Decision 2289 (ROGERS). The order in this case is clearly not excessive.

CONCLUSION

Having reviewed the entire record, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in

accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 9 June 1987, at Jacksonville, Florida is AFFIRMED.

J.C. IRWIN
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 22nd day of December, l987.

***** END OF DECISION NO. 2463 *****